Supreme Court, U.S.
FILED
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No. 85-123

In the Supreme Court of the United States

OCTOBER TERM, 1985

BETTY O. MUKA,
APPELLANT,

v.

FRANK A. CARTER, JR.,
CHIEF DISCIPLINARY COUNSEL,
APPELLEE.

MOTION TO DISMISS APPEAL FROM THE RHODE ISLAND SUPREME COURT

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I

Questions Presented

1. Was the April 19, 1985 Order of the Rhode Island Supreme Court a final judgment or decree?

2. Should Appellant's constitutional challenges to the Disciplinary Rules of the Rhode Island Supreme Court be heard initially in the U.S. District Court?

3. Does this Court have jurisdiction to review the Questions Presented by Appellant which do not raise federal issues?

4. Should Appellant have requested review of the April 19, 1985 Order of the Rhode Island Supreme Court by certiorari?

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Opinion Below

The Opinion of the Rhode Island Supreme Court in the instant case is cited at 491 A.2d 334 and is set forth in Appellant's Appendix at pages A-1 through A-6.

Statutory Provisions Involved

28 U.S.C. Section 1257. State courts; appeal; certiorari
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Also relevant are Rhode Island Supreme Court Disciplinary Rule 42-4, cited at A-1; Rhode Island Disciplinary Rule 42-5, cited at A-2; and Rhode Island Disciplinary Rule 42-6, cited at A-3.

Statement of the Case

This appeal comes before this Court as a request to review an Order of the Rhode Island Supreme Court, which Order directed the suspension of Appellant Betty O. Muka from the pactice of law in the State of Rhode Island. Appellee Frank A. Carter, Jr., Chief Disciplinary Counsel, hereby moves that said appeal be dismissed on the grounds that this Court lacks jurisdiction to entertain the same pursuant to the provisions of 28 U.S.C. Section 1257.

Appellee Frank A. Carter, Jr. is Chief Disciplinary Counsel for the Supreme Court of the State of Rhode Island with the responsibility for investigating, and if necessary, prosecuting alleged infractions by members of the Bar of the State of Rhode Island of Disciplinary Rules of the Rhode Island Supreme Court governing attorneys practicing in the State of Rhode Island. (See Rule 42-5, Supreme Court Disciplinary at A-2). On or about June 4, 1984, Appellee filed two Petitions

for Disciplinary Action in the Clerk's Office of the Rhode Island Supreme Court, alleging a number of violations by Appellant of said Disciplinary Rules. Such violations included accusing a respected member of the Rhode Island judiciary of accepting a bribe to dispose of a case and of being a member of organized crime. Ordinarily, the filing of such a Petition would be followed by a hearing before one of three Disciplinary Boards. (See Rule 42-4, Supreme Court Disciplinary Rules at A-1, and Rule 42-6, Supreme Court Disciplinary Rules at A-3). The Rhode Island Supreme Court would then review the findings and recommendations of the Disciplinary Board. However, prior to June 4, 1984, Appellant had already filed her own Disciplinary Petitions against all nine Board members, who thereupon recused themselves from hearing Appellee's Petitions. Therefore, the Rhode Island Supreme Court was the only remaining disciplinary forum available before which testimony in support of Appellee's Petitions could be presented. Following the filing of said Petitions, and Appellant's responses thereto, hearings therefore took place before the Rhode Island Supreme Court, which included the taking of testimony from numerous witnesses over a period of six months from November, 1984, through April, 1985. Those hearings resulted in the entry of the subject Order by the Rhode Island Supreme Court dated April 19, 1985, suspending Appellant from the practice of law in the State of Rhode Island.

Shortly before the disciplinary proceedings against Appellant were to begin in the Rhode Island Supreme Court, she filed a 53 page verified Complaint in the Federal District Court for the District of Rhode Island, alleging numerous state and federal constitutional infirmities in the Disciplinary Rules themselves and with regard to their application to her. The cause was initially filed in the United States District Court for the District of Rhode Island, but was transfered by that Court to the District of New Hampshire, due to the fact that Appel-

lant Muka had named as parties Defendant all of the justices of the Rhode Island Supreme Court as well as most of the judges on the Rhode Island Superior Court (Rhode Island's chief trial court), all jurists who had allegedly denied Appellant her constitutional rights at some time in the past. (See heading of Appellant's Complaint at A-5). Among the prayers for relief contained in that Complaint was a prayer for an injunction against the commencement of the pending disciplinary proceedings. Pursuant to that prayer, an evidentiary hearing was held before the Honorable Shane Devine, U.S. District Judge for the District of New Hampshire, the day before the disciplinary proceedings were to begin. Appellant's request for an injunction was denied in a holding which determined that Appellant's constitutional due process rights were being adequately protected by the Rhode Island Supreme Court. Appellant Muka appealed Judge Devine's decision to the United States Court of Appeals for the First Circuit, which on April 24, 1985 affirmed Judge Devine's order (see decision of the United States Court of Appeals for the First Circuit *in re: Betty O. Muka* v. *The Supreme Court of the State of Rhode Island, et al.* at A-7). Appellant has not sought further review of this decision. The federal cause has now been remanded back to the District Court in New Hampshire for further disposition of Appellant Muka's remaining claims.

Reasons For Granting Motion To Dismiss

I. The Order Appealed From Was Not A Final Judgment Or Decree.

Appellee believes that this Court lacks jurisdiction to review the April 19, 1985 Order of the Rhode Island Supreme Court because said Order was an interlocutory Order only, entered immediately after the culmination of the Disciplinary hearings concerning Appellant, because the Rhode Island Supreme Court deemed it advisable to effect an immediate suspension

of Appellant Muka from the practice of law in Rhode Island. The Rhode Island Supreme Court expressly stated in its Order that a complete Opinion and Final Decision would follow (see Order of Rhode Island Supreme Court at A-6, Appendix to Jurisdictional Statement of Appellant), setting forth in greater detail reasons for the suspension, and possibly providing for additional disciplinary actions.

Pursuant to 28 U.S.C. Section 1257, jurisdiction is given to this Court to review only final judgments or decrees of the highest court of a state. Such a final judgment has not as yet been entered in this matter. This Court has previously held in *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945), that:

> "considerations of English usage as well as those of judicial policy would readily justify an interpretation of the 'final judgment' so as to preclude reviewability if anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State."

The Rhode Island Supreme Court Order appealed from refers to the possibility of further disciplinary action which might be a part of that court's final decision. Also remaining to be included by the Rhode Island Supreme Court in a final ruling are additional grounds—not mentioned in the interlocutory order—for its suspension of Appellant. It is clear from the wording of the Order appealed from that this is not a final judgment or decree as required by 28 U.S.C. Section 1257.

II. Appellant's Constitutional Challenges To The Disciplinary Rules Of The Rhode Island Supreme Court Should Be Heard Initially In The Pending Federal District Court Proceeding.

A number of Appellant's Questions Presented (specifically 11, 16, 17, 19, 13—Appellant commences re-numbering after

question 21—15, 16, 17, 19,) assert federal constitutional challenges to the Rhode Island Supreme Court Disciplinary Rules themselves without specific reference to their application to Appellant in the proceedings in the Rhode Island Supreme Court. Those same constitutional challenges to the Disciplinary Rules are repeated in Appellant's pending District Court action in Claim No. 2.

This court in *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 1316-1317, 75 L.Ed.2d 206 (1983) expressly stated that Federal District Courts have subject matter jurisdiction to entertain challenges to state bar rules. The U.S. District Court for the District of New Hampshire will as part of its disposition of Appellant's Complaint, be ruling on Appellant's constitutional challenges to certain of the Rhode Island Supreme Court Disciplinary Rules. Since the Rhode Island Supreme Court did not itself address the constitutionality of the Disciplinary Rules in its Order—giving this Court no constitutional determination to review—Appellant ought not to be allowed to compel this Court to be the Court of first instance in making these constitutional determinations.

In addition, the only constitutional issues raised by Appellant before the Rhode Island Supreme Court—either concerning the Disciplinary Rules themselves, or concerning their application to her—were those raised in Questions Presented numbers 17 and 19 (immunity from suit of the members of the Disciplinary Boards, and infringement of her First Amendment rights of freedom of speech). This Court ought therefore to decline to accept for review any of the constitutional issues raised by Appellant save these two. *Cardinale* v. *Louisiana*, 394 U.S. 437, 87 S.Ct. 1161, 22 L.Ed.3d 398 (1969).

III. This Court Lacks Jurisdiction To Review by Appeal Questions Presented by Appellant Which Do Not Raise Federal Issues.

28 U.S.C. Section 1257 provides for appellate review by this Court of final judgments or decrees rendered by the highest court of a state:

(1) By appeal where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

Most of the Questions Presented by Appellant raise no federal statutory or federal Constitutional issue, but call only for the construction of the statutory or Constitutional law of the State of Rhode Island. Specifically those Questions Presented which raise no federal issue are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 (general reference to "constitutionality", but not specific reference as to which constitution, e.g. federal or state, and appropriate section), 13, 14, 15, 20, 21, 21, (second numbering—again a general reference to unconstitutional application of a Disciplinary Rule without reference to which constitution), 22—additional reference to unconstitutional treatment without further specificity, 23—further vague reference to unconstitutionality 24, 26—further vague reference to constitutionality, 27, 28, 29, 30, 31, 32—further vague reference to unconstitutionality, 33, 34, 36, 38, 39, 40, 41, 42, 43, 44 and 45.

As to those Questions Presented, which refer vaguely to some form of unconstitutionality, neither Appellee nor this court should be compelled to guess to which section of which constitution, federal or state, Appellant wishes to refer. None

of the enumerated Questions Presented draw into question the kind of federal issue referred to in the quoted sections of 28 U.S.C. Section 1257. Therefore as to these recited Questions Presented this appeal ought to be dismissed.

IV. Appellant Ought To Have Requested Review of the April 19, 1985 Order of the Rhode Island Supreme Court by Certiorari Rather than by Appeal.

Appellant clearly has sought review of the April 19, 1985 Order of the Rhode Island Supreme Court suspending her from the practice of law by appeal rather than by certiorari. She argues on page 51 of her Jurisdictional Statement that her appeal is authorized by Section 1257(2) of Title 28 of the United States Code. Her Jurisdictional Statement is clearly entitled "Appeal from the Rhode Island Supreme Court" and the Notice and Appearance papers mailed to Appellee from Appellant and from the Supreme Court Clerk's Office style this cause as an appeal and not a Petition for Writ of Certiorari.

This Court, in reviewing disciplinary actions against attorneys rendered by the highest court of a state, has always reviewed such matters by certiorari (see cases collected by this Court in footnote 15 of *District Court of Appeals* v. *Feldman*, *supra*, 103 S. Ct. 1303, 1314); it has been specifically held that orders of a state court relating to the admission, discipline and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court. See *MacKay* v. *Nesbett*, 412 F.2d 846 (9th Cir. 1969). Appellant Muka's attempt to obtain review of the contested Supreme Court Order by appeal is therefore procedurally defective and her appeal ought to be dismissed.

On page 52 of her Jurisdictional Statement Appellant claims that a Writ of Certiorari is also authorized to her by 28 U.S.C. Section 1257(3). Appellant has not filed a Petition for a Writ of Certiorari. She has filed with this Court and provided Appellee with a copy of a "Notice of Appeal" presumably in compli-

ance with Rule 10.1 of the Rules of the Supreme Court of the United States. Appellant ought not to be allowed to seek her relief in the alternative.

Conclusion

For the aforesaid reasons, Appellee Frank A. Carter, Jr., Chief Disciplinary Counsel, respectfully requests that the Appeal of Betty O. Muka, from an Order of the Rhode Island Supreme Court dated April 19, 1985, be dismissed.

Respectfully submitted,

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APPENDIX A

SUPREME COURT DISCIPLINARY RULES

42-4. Disciplinary board of this court. — (a) This court shall appoint a board to be known as "The Disciplinary Board of the Supreme Court of Rhode Island" (hereinafter referred to as "the Board") which shall consist of nine (9) members of the bar of this state, one (1) of whom shall be designated by this court as Chairman and another as Vice Chairman.

(b) When the Board is first selected, three (3) of its members shall be appointed for a term of one (1) year, three (3) for a term of two (2) years, and three (3) for a term of three (3) years. All terms thereafter shall be for three (3) years, and no member shall serve for more than six (6) years. The Board shall act only with the concurrence of not less than five (5) members. Five (5) members shall constitute a quorum. The terms of the members shall commence on May 1, 1975.

(c) The Board shall have the power and duty:

(1) to consider and cause to be investigated the conduct of any attorney on its own motion or upon complaint in writing by any person or as directed by this court;

(2) to review the findings and recommendations of the Chief Disciplinary Counsel, hereinafter referred to, with respect to formal charges and to prepare and forward its own findings and recommendations to this court, which shall review such findings and recommendations on the basis of the record and shall enter an appropriate order disposing of the proceeding;

(3) to consider and cause to be investigated information that an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, and to petition this court for a determination when deemed advisable;

(4) to adopt rules of procedure not inconsistent with these rules and to provide for the arbitration of fee disputes, which apparently do not involve violations of the code of professional responsibility, upon complaints of clients against their attorneys; and

(5) to maintain permanent records of all matters processed and the disposition thereof. (As amended by the court on January 8, 1976.)

42-5. **Disciplinary counsel.** — (a) This court shall appoint a Chief Disciplinary Counsel (hereinafter referred to as "Counsel") and such assistants and staff as may from time to time be required to properly perform the functions hereinafter prescribed.

(b) Counsel shall have the power and duty:

(1) to investigate all matters involving alleged misconduct which come to his attention whether by complaint or otherwise;

(2) to recommend to the Board the disposition of all matters involving alleged misconduct by dismissal or the prosecution of formal charges. Except in matters requiring dismissal because the complaint is frivolous on its face or falls outside the Board's jurisdiction, no disposition shall be recommended by counsel until the respondent-attorney shall have been afforded the opportunity to state his position with respect to the allegations against him;

(3) to prosecute all disciplinary proceedings before the Board;

(4) to appear at hearings before this court with respect to motions for reinstatement by suspended or disbarred attorneys, to cross-examine witnesses testifying in support of the motion and to marshall available evidence, if any, in opposition thereto;

(5) to take such steps as may be necessary to ascertain and to inform this court whenever an attorney has

been declared incompetent or committed on the grounds of incompetency or disability; and

(6) to maintain permanent records of all matters processed and the disposition thereof.

42-6. Procedure. — (a) Investigation — All investigations, whether upon complaint or otherwise, shall be initiated and conducted by Counsel. Upon the conclusion of an investigation, Counsel shall recommend to the Board the disposition of all matters involving alleged misconduct either by dismissal or by the prosecution of formal charges before the Board. The recommended disposition shall be reviewed by the Board which may approve or modify such recommendation. A respondent-attorney may demand as of right that a formal proceeding be instituted against him before the Board. In the event of such demand, the matter shall be disposed of in the same manner as any other formal hearing instituted before the Board.

(b) Formal Hearing — Formal disciplinary proceedings before the Board shall be instituted by Counsel filing with the Board a petition setting forth with specificity the charges of misconduct. A copy of the petition shall be served upon the respondent-attorney. Within twenty (20) days thereafter, the respondent-attorney shall serve a copy of his answer upon Counsel and file the original thereof with the Board. In the event the respondent-attorney fails to file an answer, the charges shall be deemed at issue. Following the service of the answer, if there are any issues of fact raised by the pleadings or if the respondent-attorney requests the opportunity to be heard in mitigation, the matter shall be assigned to the Board, and Counsel shall serve a notice of hearing upon the respondent-attorney, or his counsel, indicating the date and place of the hearing, at least fifteen (15) days in advance thereof. The notice of hearing shall advise the respondent-attorney that he is entitled to be represented by counsel, to summon and cross-examine witnesses and to present evidence in his own behalf.

The Board shall submit a report to this court within sixty (60) days after the conclusion of the hearing and submission of briefs, if any, containing its findings and recommendations, together with a record of the proceedings before it.

(c) Annual Report — The Board shall annually in July report to this court in writing all matters presented for its consideration during the year ended on the previous April 30.

(d) Review by this Court — If the Board determines that a proceeding should be dismissed, or that it should be concluded by private censure, it shall instruct Counsel to notify this court of its recommendation, and this court shall enter an appropriate order. If the Board shall determine that the matter should be concluded by a recommendation of public censure, suspension or disbarment, it shall submit its findings and recommendations, together with the entire record, to this court. This court shall review the record and enter an appropriate order. Proceedings, if any, before this court shall be conducted by Counsel.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CIVIL ACTION NO. _____

BETTY O. MUKA,
PLAINTIFF,

v.

THE SUPREME COURT OF THE STATE OF RHODE ISLAND, JOSEPH A. BEVILACQUA, THOMAS F. KELLEHER, JOSEPH R. WEISBERGER, FLORENCE KERINS MURRAY, DONALD F. SHEA, WALTER J. KANE, BRIAN B. BURNS, BEVERLY CLARK, RONALD A. TUTALO, THE STATE OF RHODE ISLAND, DISCIPLINARY COUNSEL, FRANK A. CARTER, JR., DISCIPLINARY BOARD, ERNEST AGRESTI, MELVIN A. CHERNICK, LEONARD KIERNAN, ROBERT KILMARX, LEWIS Z. LAVINE, JEREMIAH C. LYNCH, NANCY PALMISCIANO, ANTHONY VACCA, RONALD R. LAGUEUX, KENNETH P. BORDEN, ARTHUR G. CAPALDI, JOSEPH Q. CALISTA, JOSEPH F. RODGERS, COMMISSION ON JUDICIAL DISCIPLINE AND TENURE, RAYMOND J. SURDUT, KENNETH J. MACKSOUD, ROSENSTEIN SURDUT MACKSOUD & GOODWIN, B. LUCIUS ZARLENGA, EDWARD P. SOWA, GUNNING LAFAZIA & GNYS INC., JOHN B. REILLY, CLIFFORD J. CAWLEY, J. JOSEPH NUGENT, STEPHEN NUGENT, MARK T. NUGENT, THOMAS R. DESIMONE, JOHN T. BEVILACQUA, JOSEPH A. KELLY, DAVID W. CARROLL, MARK S. MANDELL, LOUIS B. RUBENSTEIN, ALFRED G. THIBODEAU, JOHN F. DOLAN, THOMAS H. NEEDHAM, NUGENT & NUGENT, LEONA CHARPENTIERE, JOHN DOE LAW CLERK OF THOMAS H. NEEDHAM, CHARLES F. TRUMPETTO, HENRY E. LALIBERTE, GORHAM & GORHAM, ALICE MILES, RUTH GORHAM, BRADFORD GORHAM, JOHN GORHAM, ARTHUR M. READ II, NICHOLAS BARRETT, ERNIE DIBELLO, ALEXANDER WALSH, MARY KING, SUPREME COURT CLERK'S OFFICE, SUPERIOR COURT CLERK'S OFFICE, ANTHONY A. GIANNINI, C. RUSSELL BENGTSON, CAROL A. CAMPAGNONE, ROSALIND CHASET, DOMINIC F. CRESTO, WILLIAM EGAN, HARRY M. IONNATTI, JOHN B. LAWLOR, LESLIE D. LEMIEUX, KATHLEEN MANAGHAN, MEDICAL MALPRACTICE JOINT UNDERWRITERS ASSOCIATION OF RHODE ISLAND, and other John and Jane Does unknown at this time, PEERLESS INSURANCE COMPANY, ROSALIND CHASET AS ADMINISTRATRIX OF THE ESTATE OF THE LATE NATHAN D. CHASET, PIRRAGLIA, 6TH DISTRICT COURT CLERK'S OFFICE,
DEFENDANTS.

JURISDICTION

28 U.S.C. 1331, 1332, 1343, etc.

SUBSTANTIVE LAW

42 U.S.C. 1980, 1981, 1983, 1985, 1986, 2000a, etc., common law tort, agency & contract law, United States Constitution Art. VI, Sec. 2, and Amendments #1, 7, 10, 11, 14, etc., the Rhode Island Constitution, and general laws, Pub. L. 90-284, Title VIII, etc.

REMEDIES

28 U.S.C. 1331, 1343, 2201, 2202, 2283, 1651, common law, etc.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 84-2036

BETTY O. MUKA,

PLAINTIFF, APPELLANT,

v.

THE SUPREME COURT OF THE STATE OF RHODE ISLAND, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. SHANE DEVINE, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
BREYER AND TORRUELLA, *Circuit Judges*.

Betty O. Muka on brief pro se.
Marilyn F. McGair and *Thomas Dickinson*, Special Assistant Attorneys General, and *Arlene Violet*, Attorney General, on brief for appellees.

April 24, 1985

Per Curiam. Plaintiff, a lawyer facing disciplinary proceedings before the Supreme Court of Rhode Island, appeals from the denial of her motion for a preliminary injunction to enjoin the disciplinary proceedings on the grounds that the state constitution and various court rules are unconstitutional and that she has been denied due process in the proceedings.

Absent bad faith, harassment, or other extraordinary circumstances, federal courts must abstain from interfering with state disciplinary proceedings. *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423 (1982). Pointing to her 53 page verified complaint and other pleadings, plaintiff contends she has shown the necessary bad faith. However, an evidentiary hearing was held on plaintiff's motion for a preliminary injunction, after which the district court referred to abstention principles and found that the hearing the state court intended to hold would afford plaintiff due process and that it was unlikely plaintiff would succeed on the merits of her claims. Plaintiff has not furnished us with a transcript of the evidentiary hearing, and hence on the record before us we see no error or abuse of discretion in the denial of preliminary injunctive relief. *See Muniz Ramirez* v. *Puerto Rico Fire Services*, No. 84-1650, slip. op. at 2-3 (1st Cir. April 1, 1985) (appellant's duty to furnish transcript).

Plaintiff's motion to strike the Attorney General's brief is denied. The Attorney General's motion for double costs is granted; attorneys fees are denied.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 84-2036

BETTY O. MUKA,
PLAINTIFF, APPELLANT,

v.

THE SUPREME COURT OF THE STATE OF RHODE ISLAND, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT
ENTERED: APRIL 24, 1985

This cause came on appeal from the United States District Court for the District of New Hampshire, and was submitted on the original record and the briefs.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Double costs to appellees, Rhode Island Supreme Court, Et Al.

By the Court:

FRANK P. SCIGLIANO, *Clerk*.